

Campaign Finance Policy After *Citizens United v. Federal Election Commission*: Issues and Options for Congress

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Summary

Following the Supreme Court's January 21, 2010, ruling in *Citizens United v. Federal Election Commission*, questions have emerged about which policy options could be available to Congress. This report provides an overview of selected campaign finance policy options that may be relevant. It also briefly comments on how *Citizens United* might affect political advertising. A complete understanding of how *Citizens United* will affect the campaign and policy environments is likely to be unavailable until at least the conclusion of the 2010 election cycle.

As Congress considers legislative responses, at least two broad choices could be relevant. First, Congress could provide candidates or parties with additional access to funds to combat corporate influence in elections. Second, Congress could restrict spending under certain conditions or require those making expenditures post-*Citizens United* to provide additional information to voters or regulators. Options within both approaches could generate substantial debate. Some may contend that the only way to provide Congress with the power to directly affect the content of the ruling would be to amend the Constitution.

More than 40 bills introduced during the 111th Congress may be relevant for legislative responses to *Citizens United*. These include H.Con.Res. 13, H.J.Res. 13, H.J.Res. 68, H.J.Res. 74, H.J.Res. 82, H.J.Res. 84, H.Res. 1275, H.R. 158, H.R. 1095, H.R. 1826, H.R. 2038, H.R. 2056, H.R. 3574, H.R. 3859, H.R. 4431, H.R. 4432, H.R. 4433, H.R. 4434, H.R. 4435, H.R. 4487, H.R. 4510, H.R. 4511, H.R. 4517, H.R. 4522, H.R. 4523, H.R. 4527, H.R. 4537, H.R. 4540, H.R. 4550, H.R. 4583, H.R. 4617, H.R. 4630, H.R. 4644, H.R. 4749, H.R. 4768, H.R. 4790, H.R. 5175, S.J.Res. 28, S.J.Res. 36, S. 133, S. 752, S. 2954, S. 2959, S. 3004, S. 3295, and S. 3628. The House passed H.R. 5175, a version of the DISCLOSE Act (an acronym for "Democracy is Strengthened by Casting Light on Spending in Elections"), on June 24, 2010. (For additional discussion, see CRS Report R41264, *The DISCLOSE Act: Overview and Analysis*, by R. Sam Garrett, L. Paige Whitaker, and Erika K. Lunder). Given the pace of developments since the ruling, this report is not intended to be exhaustive. Relevant legislation that has been introduced thus far is reflected through selected examples and in **Table 1** at the end of this report.

This report is not intended to provide a legal analysis of *Citizens United* or of constitutional issues that might affect the policy options discussed here. CRS Report R41045, *The Constitutionality of Regulating Corporate Expenditures: A Brief Analysis of the Supreme Court Ruling in Citizens United v. FEC*, by L. Paige Whitaker, and CRS Report R41096, *Legislative Options After Citizens United v. FEC: Constitutional and Legal Issues*, by L. Paige Whitaker et al., discuss legal and constitutional issues.

Events described in this report are current as of September 2010, when the report was last substantively updated. No major additional campaign finance activity occurred during the 111th Congress. For discussion of the ongoing evolution of *Citizens United* policy issues, see CRS Report R41542, *The State of Campaign Finance Policy: Recent Developments and Issues for Congress*, by R. Sam Garrett.

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Introduction

On January 21, 2010, the Supreme Court issued a 5-4 ruling in *Citizens United v. Federal Election Commission*. The ruling has the potential to reshape the campaign finance environment politically and legislatively because previously restricted political advertising is now apparently permissible. This report provides an overview of selected campaign finance policy issues that may be relevant for Congress as the House and Senate consider how or whether to respond to the ruling.

At least two broad approaches may be available. First, Congress could raise limits on contributions or coordinated party expenditures to increase the amount of money available to candidates facing advertising aired by corporations or opponents. Second, Congress could restrict spending under certain conditions or require those making expenditures to provide additional information to voters or regulators. Options within both approaches may generate debate and would entail advantages and disadvantages. Some may argue that the only way to provide Congress with the power to directly affect the content of the ruling would be to amend the Constitution—an option that is likely to be controversial and laborious. As **Table 1** at the end of this report shows, and as the text of the report discusses, proposed legislative responses to *Citizens United* contain elements of both approaches. Most bills have focused on requiring additional disclosure (reporting of information). Some have also proposed restricting spending by particular types of companies or groups.

This report is intended to respond to Congress's ongoing interest in campaign finance policy options following *Citizens United*. Given the pace of developments since the ruling, the report is not intended to be exhaustive. Rather, it provides an overview of those issues and options that appear to be potentially relevant; it will be updated regularly as developments warrant. Additional legislation will be reflected in future updates. This report does not provide—nor is it intended to provide—a legal analysis of *Citizens United* or of legal issues that might affect the policy options discussed here. CRS Report R41045, *The Constitutionality of Regulating Corporate Expenditures: A Brief Analysis of the Supreme Court Ruling in Citizens United v. FEC*, by L. Paige Whitaker, and CRS Report R41096, *Legislative Options After Citizens United v. FEC: Constitutional and Legal Issues*, by L. Paige Whitaker et al., discuss legal and constitutional issues. Another CRS report, CRS Report R41264, *The DISCLOSE Act: Overview and Analysis*, by R. Sam Garrett, L. Paige Whitaker, and Erika K. Lunder, discusses the DISCLOSE Act (discussed below) in more detail.

Events described in this report are current as of September 2010, when the report was last substantively updated. No major additional campaign finance activity occurred during the 111th Congress. For discussion of the ongoing evolution of *Citizens United* policy issues, see CRS Report R41542, *The State of Campaign Finance Policy: Recent Developments and Issues for Congress*, by R. Sam Garrett.

Background on Key Issues

From a campaign finance policy perspective, *Citizens United* appears to be most relevant for political advertising funded by corporate or union treasuries. Two issues are particularly noteworthy. First, corporations and unions now appear to be permitted to fund advertising explicitly calling for the election or defeat of federal (or state) candidates. Second, previous restrictions on corporate- or union-funded broadcast ads known as *electioneering communications* have been eased. Despite these changes, corporate and union advertising purchases must be made independently—meaning that the advertising may not be coordinated with the campaigns that are

supported or opposed in the advertising. The ban¹ on corporate or union contributions to political committees (candidate committees, party committees, and political action committees (PACs)), remains in effect.

Before *Citizens United*, the Federal Election Campaign Act (FECA)², as amended, generally prohibited corporations and unions from using their treasury funds for making expenditures influencing federal elections—including political advertising known as *express advocacy*, which explicitly calls for election or defeat of federal candidates.³ Corporations and unions could, however, establish *separate segregated funds* (PACs) to fund express advocacy or make contributions to candidate campaigns, political party committees, or other PACs. Following *Citizens United*, corporations may now fund unlimited express advocacy messages—provided that the advertisements are *independent expenditures*, meaning that they are uncoordinated with the campaign that is supported or opposed.

Also before *Citizens United*, the 2002 Bipartisan Campaign Reform Act (BCRA) prohibited corporate and union treasuries from funding broadcast advertisements known as *electioneering communications* that mention clearly identified federal candidates (but not necessarily calling for their election or defeat) within 60 days of a general election or 30 days of a primary election.⁴ As a result, corporations that wanted to air at least some messages referring to federal candidates during periods preceding elections either had to establish a PAC to receive voluntary contributions to fund the ads or forgo the advertising altogether.⁵ Now, however, corporations and unions appear to be free to fund electioneering communications from their treasuries at any time.

Given these developments, questions have emerged about how political advertising might be affected and whether the airwaves will be flooded with corporate express advocacy. The answers to those questions are currently unknown, but they have implications for how campaigns at the federal (and state) levels will be waged. Depending on the outcome—or potential outcome—Congress might choose to enact legislation restricting political advertising or other aspects of federal election policy. Because this is the first time in modern history that such expenditures have been permitted at the federal level, it remains to be seen how much additional money, if any, might flow into the political system. A more complete understanding of how *Citizens United* will affect the political environment, including campaign spending, will likely be unavailable until after the 2010 election cycle.

Legislative Action Thus Far

The legislative response to *Citizens United* began developing immediately after the January 21 ruling. In fact, some legislation relevant for the ruling was introduced even before the Court announced its decision.⁶ The Senate Committee on Rules and Administration held the first

¹ 2 U.S.C. § 441b.

² 2 U.S.C. § 431 *et seq.*

³ 2 U.S.C. § 441b.

⁴ 2 U.S.C. § 434(f)(3). It appears that *Citizens United* upheld disclosure and disclaimer requirements for electioneering communications. For additional discussion, see CRS Report R41045, *The Constitutionality of Regulating Corporate Expenditures: A Brief Analysis of the Supreme Court Ruling in Citizens United v. FEC*, by L. Paige Whitaker.

⁵ The Supreme Court arguably relaxed corporations' abilities to fund electioneering communications in its 2007 decision in *Wisconsin Right to Life v. Federal Election Commission*. For additional discussion, see CRS Report RS22687, *The Constitutionality of Regulating Political Advertisements: An Analysis of Federal Election Commission v. Wisconsin Right to Life, Inc.*, by L. Paige Whitaker.

⁶ For example, as **Table 1** shows, Representative Grayson introduced several bills on January 13, 2010.

Citizens United hearing on February 2, 2010. Both the Committee on House Administration and House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties held *Citizens United* hearings on February 3, 2010. Each of the hearings assessed the ruling and considered various policy options, as did a March 10, 2010, Senate Judiciary Committee hearing.

Thus far, three hearings have considered specific legislation. First, on March 11, the House Committee on Financial Services, Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises, held a hearing addressing corporate governance and shareholder protection after *Citizens United*. In addition to exploring general themes, various legislative proposals, including Representative Capuano's Shareholder Protection Act (H.R. 4790), were discussed.⁷ Among other provisions, the legislation would require a majority of shareholders to approve certain expenditures for "political activities" for the following fiscal year and board approval for political activities exceeding \$50,000. On July 29, 2010, the Committee on Financial Services ordered an amended version of H.R. 4790 reported. Second, on May 6, 2010, the Committee on House Administration held a hearing on H.R. 5175, the House version of the DISCLOSE Act (discussed below). The committee held a second hearing (the third on specific legislation) on H.R. 5175 on May 11, 2010.

Table 1 at the end of this report provides an overview of legislation that may be or has been relevant for a congressional response to *Citizens United*. Most of the bills introduced concentrate on one or two major policy issues (e.g., spending restrictions, shareholder protection, public financing, etc.) and were introduced within a month of the Court's ruling. By contrast, three bills that have been the subject of more recent attention are House and Senate versions of the DISCLOSE Act (an acronym for "Democracy is Strengthened by Casting Light on Spending in Elections"), sponsored by Representative Van Hollen and Senator Schumer respectively. These bills include a variety of provisions, including many that appeared in other legislation noted throughout this report. Representative Van Hollen introduced the House measure, H.R. 5175, on April 29, 2010. Senator Schumer introduced the Senate version, S. 3295, the next day. After the House Administration Committee reported⁸ an amended version of H.R. 5175 on May 25, the House of Representatives passed the bill, with additional amendments, on June 24, 2010, by a 219-206 vote.⁹ Senator Schumer introduced a revised version of his bill, S. 3628, on July 21, 2010. The Senate chose not to invoke cloture on July 27, 2010. The bill remains on the calendar.

Two types of provisions in the DISCLOSE Act have been the subject of most legislative attention thus far. First, provisions in the bill would provide greater information to the public and the FEC about certain political spending. In particular, the bill proposes additional disclosure (i.e., reporting) and disclaimer (i.e., sponsor identification) requirements surrounding independent expenditures and electioneering communications funded by corporations, unions, and certain tax-exempt organizations. Second, the bill proposes to restrict the ability of certain government contractors, corporations subject to foreign influence, and Troubled Asset Relief Program (TARP) recipients from making expenditures or contributions in federal elections. These provisions, and the other bills discussed in this report, generally appear to be focused on providing additional information about, or limiting, the increased political advertising that some argue *Citizens United* will facilitate.

⁷ The Legislative Information Session and *Congressional Record Daily Digest* do not, however, note that a hearing was held on H.R. 4790 per se.

⁸ U.S. Congress, House Committee on House Administration, *DISCLOSE Act*, report to accompany H.R. 5175, 111th Cong., 2nd sess., May 25, 2010, H.Rept. 111-492 (Washington: GPO, 2010).

⁹ "Democracy is Strengthened by Casting Light on Spending in Elections Act," House vote 391, *Congressional Record*, daily edition, vol. 156 (June 24, 2010), p. H4828.

Provisions in H.R. 5175 as Passed by the House, S. 3295 as Introduced, and S. 3628 as Introduced

A comprehensive overview of this lengthy and complex legislation is beyond the scope of this report. (For additional discussion of the DISCLOSE Act, see CRS Report R41264, *The DISCLOSE Act: Overview and Analysis*, by R. Sam Garrett, L. Paige Whitaker, and Erika K. Lunder.) In brief, however, the various versions of the DISCLOSE Act would generally:

- expand the current definitions of *independent expenditure* and *electioneering communication*, thereby mandating expanded disclosure and disclaimer requirements for certain political communications run by corporations, unions, and certain tax-exempt § 527 and § 501(c) organizations (*covered organizations*), and broadening the kind of communications that may be subject to FECA prohibitions;
- require *covered organizations* to report to the FEC information about their donors (including transfers) and spending for certain independent expenditures and electioneering communications;
- require corporate chief executive officers or other high-ranking officials in *covered organizations* to state their approval for advertising content, similar to current “stand by your ad” requirements for candidate ads;
- prohibit certain government contractors from making independent expenditures and electioneering communications in federal elections; prohibit TARP recipients from making contributions, independent expenditures, and electioneering communications in federal elections; and prohibit corporations subject to certain control or ownership by foreign nationals (e.g., U.S. subsidiaries of foreign corporations) from making contributions, independent expenditures, and electioneering communications in federal, state, and local elections; and
- remove existing limits on coordinated party expenditures if a candidate or candidate campaign does not control the expenditure.

Discussion of differences between the measures appears in CRS Report R41264, *The DISCLOSE Act: Overview and Analysis*, by R. Sam Garrett, L. Paige Whitaker, and Erika K. Lunder.

Overarching Questions

Regardless of the particular legislative path proposed, major policy questions relevant for the bills introduced thus far—and which may well influence debate over that legislation—include the following:

- Should corporate or labor entities be restricted in their abilities to make independent political expenditures, and if so, how? In particular, should spending by subsidiaries of foreign corporations be treated differently than other entities? If so, what characteristics (e.g., ownership amounts, etc.) should be used to determine which corporations will be subject to additional regulation?
- What information about corporate or labor independent expenditures should be reported to regulators such as the FEC or Securities and Exchange Commission, shareholders, or voters? In particular, should corporate advertising be required to personally identify chief executives in ads, corporate funders for ads, etc.?

- Should Congress restructure the political financing system to provide candidates with additional tools to respond to independent corporate or labor expenditures? In particular, should public financing of campaigns be permitted as an alternative to private fundraising; should a constitutional amendment be adopted permitting Congress to otherwise regulate political money?
- To what extent should the provisions of any legislative proposal apply equally to various types of organizations? In particular, how should corporations, unions, tax-exempt organizations (some of which may be incorporated), or other entities be regulated, if at all?

As discussed below, existing law addresses some aspects of those and other questions, but Congress could choose to enact additional provisions.

Selected Campaign Finance Policy Options for Congress

In the wake of *Citizens United*, Congress must contend with how, or whether, to respond through enacting legislation. This section provides an overview of various issues and options that have emerged thus far and that might be relevant. The discussion here emphasizes those options most closely related to campaign finance policy, such as restrictions on spending, advertising, or fundraising. Additional options, legislation, or discussion will be reflected in future updates to this report as warranted. Constitutional or legal issues that are beyond the scope of this report may be relevant for the policy options discussed here; other CRS products provide relevant analysis.¹⁰

Maintain the Status Quo

If Congress chooses to take no action, the *Citizens United* decision would presumably be unaffected. As noted above, corporations would be permitted to make independent expenditures, including airing express advocacy messages, as much or as little as they chose. For those who believe that *Citizens United* correctly strengthens corporate abilities to participate in federal elections, or those who otherwise believe that a congressional response is unnecessary, maintaining the status quo could be a preferred option. Those who believe that additional regulation is necessary, however, may choose (or have chosen) to pursue legislation.¹¹

Amend the Constitution

Both before and after *Citizens United*, proposals have emerged to amend the Constitution to permit Congress to further regulate campaign finance. In fact, proposals to amend the Constitution to give Congress more power to regulate political spending have been regularly introduced since at least the 1970s. As of this writing, the following relevant constitutional amendments have been introduced during the 111th Congress: H.J.Res. 13 (Kaptur), H.J.Res. 68 (Boswell), H.J.Res. 74 (Edwards, MD), H.J.Res. 82 (Hodes), H.J.Res. 84 (Schrader), S.J.Res. 28

¹⁰ See, for example, CRS Report RL30669, *The Constitutionality of Campaign Finance Regulation: Buckley v. Valeo and Its Supreme Court Progeny*, by L. Paige Whitaker.

¹¹ In addition, the Federal Election Commission has stated that it will issue guidance to the regulated community. See Federal Election Commission, “Supreme Court Issues Opinion in *Citizens United v. FEC*,” press release, January 21, 2010, <http://www.fec.gov/press/press2010/20100121CitizenUnited.shtml>.

(Dodd), and S.J.Res. 36 (Baucus). These measures illustrate that there are potentially multiple ways in which Congress could frame a constitutional amendment, such as by providing additional leeway to regulate campaign spending (or contributions) generally, or specifically with respect to corporate campaign activities. Amending the Constitution, however, would likely be controversial and time-consuming.

Enact Public Financing

Public financing of campaigns has long been seen as a potential solution to “big money” in politics, including following *Citizens United*. Proponents argue that public financing would reduce or eliminate candidates’ dependence on private funds, thereby limiting the potential for conflicts of interest and permitting candidates more time to focus on policy matters. Public financing of presidential campaigns has been in place since 1976, and 16 states offer public financing of state legislative or executive campaigns.¹² Several attempts to enact public financing of U.S. House and Senate campaigns have been unsuccessful, although proposals have been introduced regularly since the 1970s.

Traditionally, public financing programs offer grants or matching funds designed to cover full campaign costs. In exchange for receiving public funds, candidates must usually agree to limit their private fundraising and spending. Two public financing measures introduced in the 111th Congress—H.R. 158 (Obey) and H.R. 2056 (Tierney)—would take such an approach (although the two bills differ substantially). Also in the 111th Congress, three similar measures—H.R. 6116 (Larson), H.R. 1826 (Larson), and S. 752 (Durbin)—would not require candidates to limit their spending, provided that campaign funds came only from public funds and small, private contributions (i.e., \$100 or less).

Enacting public campaign financing could arguably achieve various policy goals, such as enhancing the role of small contributions and grassroots donors—potentially an attractive alternative for those who feel that the status quo unduly focuses on large contributions. Some candidates may also view participating in public financing as a way to deemphasize corporate money in politics following *Citizens United* (although, as noted previously, the ban on corporate campaign contributions remains in place).

On the other hand, publicly financed candidates may face challenges following *Citizens United* if they encounter high levels of outside advertising targeting their campaigns. For example, even if two competing candidates had roughly equal resources based on participation in public financing, their abilities to raise funds in response to outside political advertising would be limited to public financing amounts or additional “small dollar” fundraising (depending on the public financing mechanism Congress adopted). Regardless of *Citizens United*, however, these same obstacles could occur even without corporate express advocacy if a publicly financed candidate were the object of high levels of opposition spending by privately financed opponents, parties, or interest groups.

¹² For additional detail on the presidential public financing program, see CRS Report RL33814, *Public Financing of Congressional Campaigns: Overview and Analysis*, by R. Sam Garrett. On proposals for public financing of congressional campaigns and discussion of state programs, see CRS Report RL33814, *Public Financing of Congressional Campaigns: Overview and Analysis*, by R. Sam Garrett.

Provide Campaigns or Parties With Additional Access to Funds

If political advertising increases following *Citizens United*, political campaigns may feel additional pressure to raise funds to counter outside advertising. At least two options exist for providing additional resources to campaigns, parties, or both. First, contribution limits could be increased. This option could allow those who wish to give more to do so, thereby increasing the funds available to candidates or parties waging campaigns.¹³

Second, the existing caps on party coordinated expenditures could be raised or eliminated.¹⁴ Coordinated expenditures allow parties to buy goods or services on behalf of a campaign—in limited amounts—and to discuss those expenditures with the campaign.¹⁵ In recent years, some Members of Congress have called for increasing or repealing the caps on coordinated party expenditures to provide parties with greater flexibility to support their candidates.¹⁶ In a post-*Citizens United* environment, additional party coordinated expenditures could provide campaigns facing increased outside advertising with additional resources to respond. Permitting parties to provide additional coordinated expenditures may also strengthen parties as institutions by increasing their relevance for candidates and the electorate. A potential drawback of this approach, however, is that some campaigns may feel compelled to adopt party strategies at odds with the campaign's wishes in order to receive the benefits of coordinated expenditures.¹⁷ H.R. 5175 (Van Hollen), S. 3295 (Schumer), and S. 3628 (Schumer) propose to exempt certain spending from coordinated party expenditure limits if a candidate campaign does not direct or control the spending.

Those concerned with the influence of money in politics may object to any attempt to increase contribution limits or coordinated party expenditures, even if those limits were raised in an effort to respond to corporate-funded advertising. Additional funding in some form, however, may be attractive to those who feel that greater resources will be necessary to compete in a post-*Citizens United* environment, or perhaps to those who support increased contribution limits as a step toward campaign deregulation.

Restrict Certain Types of Expenditures

Following *Citizens United*, some debate has focused on whether Congress could restrict independent expenditures, particularly if a potential risk of corruption—a historic rationale for campaign finance regulation—could be established. At least three areas appear to be particularly

¹³ For the 2010 election cycle, individuals may contribute no more than \$2,400 per candidate, per election (for a combined primary and general election limit of \$4,800). Individuals may contribute no more than \$5,000 to multicandidate PACs (which includes most PACs) annually, and no more than \$30,400 to a national party committee annually. Contribution limits for 2010 are available on the FEC website at http://www.fec.gov/ans/answers_general.shtml#How_much_can_I_contribute.

¹⁴ This option would not provide campaigns with additional funding per se, but it could ease the financial burden on campaigns for those purchases that parties make on the campaign's behalf.

¹⁵ Coordinated party expenditures are subject to limits based on office sought, state, and voting-age population (VAP). Exact amounts are determined by formula and updated annually by the FEC.

¹⁶ For additional information, including a discussion of legislation introduced in the 110th Congress to lift the caps on party coordinated expenditures, see CRS Report RS22644, *Coordinated Party Expenditures in Federal Elections: An Overview*, by R. Sam Garrett and L. Paige Whitaker.

¹⁷ The long-running debate about relationships between parties and candidates is well documented. For a brief overview, see, for example, Marjorie Randon Hershey, *Party Politics in America*, 12th ed., pp. 65-83; and Paul S. Herrnson, *Congressional Elections: Campaigning at Home and in Washington*, 4th ed., pp. 86-128.

relevant: (1) spending restrictions on foreign corporations or U.S. subsidiaries, (2) restrictions on government contractors, and (3) shareholder protection issues.

First, foreign nationals—including companies incorporated or having principal places of business in foreign countries—already appear to be prohibited from making expenditures (including independent expenditures and electioneering communications) in federal or state elections.¹⁸ Congress may choose, however, to pursue additional restrictions concerning U.S. subsidiaries of foreign corporations or other corporations subject to foreign influence, such as amending FECA’s current definition of “foreign national” to include additional types of corporations. Congress could also clarify restrictions on PAC activity by U.S. subsidiaries of foreign corporations.¹⁹ In the 111th Congress, for example, H.R. 3859 (Kaptur) would prohibit PACs affiliated with organizations or corporations controlled by foreign entities from making expenditures or contributions. Other bills, such as H.R. 4510 (Grayson), H.R. 4517 (Hall), H.R. 4522 (Pascrell), H.R. 4523 (Perriello), H.R. 4540 (DeLauro), S. 2954 (Menendez), S. 2959 (Franken), and S. 3004 (Brown, OH), could extend contribution or expenditure restrictions to corporations owned or controlled by foreign principals. The DISCLOSE Act (H.R. 5175, S. 3295, and S. 3628) also proposes to amend the existing foreign national prohibitions.

Second, Congress could pursue restrictions on the amount of independent expenditures made by firms that hold government contracts or receive federal assistance.²⁰ FECA already prohibits individual government contractors from making campaign contributions or from soliciting campaign funds. Government contractors may, however, form PACs.²¹ In addition to these measures, the House and Senate could consider restricting the ability of firms with government contracts from funding express advocacy messages, either in general or at certain monetary thresholds. In the 111th Congress, bills such as H.R. 1095 (Maloney), H.R. 4434 (Grayson), H.R. 4617 (Walz), H.R. 4768 (Grayson), and S. 133 (Feinstein) propose additional regulation on political expenditures by firms that hold government contracts, received federal economic assistance, or both. Some of those measures also include restrictions on lobbying expenditures.²² The DISCLOSE Act (H.R. 5175, S. 3295, and S. 3628) also proposes to amend the existing government contractor prohibitions.

Third, some advocates of additional campaign finance regulation have proposed that Congress consider measures to give shareholders additional voice in corporations’ political spending decisions. Examples include requiring corporations to obtain permission from a majority of shareholders before engaging in political spending (such as express advocacy) or requiring corporations to provide advance notice of political expenditures.²³ Both options could be applied in general or with respect to particular levels of spending (or perhaps in certain cases, at specific

¹⁸ 2 U.S.C. § 441e; and 11 C.F.R. § 110.20.

¹⁹ The FEC has determined through the advisory opinion process that U.S. subsidiaries of foreign companies may form PACs under certain circumstances. For an overview, see Federal Election Commission, *Corporate and Labor Organizations*, Campaign Guide, Washington, DC, January 2007, p. 17, <http://www.fec.gov/pdf/colagui.pdf>. In general, however, the issue of PACs among U.S. subsidiaries of foreign corporations appears not to be addressed in detail in FECA or FEC regulations.

²⁰ On constitutional issues, see, for example, pages 21-30 in CRS Report RL34725, “Political” Activities of Private Recipients of Federal Grants or Contracts, by Jack Maskell.

²¹ 2 U.S.C. § 441c.

²² On a related note, H.R. 4511 (Grayson) would restrict electioneering communications by corporations that employ or retain lobbyists.

²³ The Brennan Center for Justice at New York University, which generally advocates for greater campaign finance regulation, has proposed both approaches. See, for example, Ciara Torres-Spelliscy, *Corporate Campaign Spending: Giving Shareholders a Voice*, Brennan Center for Justice, New York University, New York, NY, January 2010, http://brennan.3cdn.net/0a5e2516f40c2a33f6_3cm6ivqcn.pdf.

times, etc.). Relevant measures introduced thus far include H.R. 4487 (Grayson), H.R. 4537 (Capuano), H.R. 4644 (Sestak), H.R. 4630 (Ackerman), H.R. 4790 (Capuano), and S. 3004 (Brown, OH). The DISCLOSE Act (H.R. 5175, S. 3295, and S. 3628) would require corporations to provide additional information about certain campaign-related expenditures in reports to shareholders, but would not require shareholder approval of such expenditures.

Shareholder protection measures could have the advantage of increasing the likelihood that corporations' political spending decisions will be consistent with a majority of shareholders' wishes—or at least that shareholders will have notice of those decisions in advance. Notice or permission requirements that are perceived as burdensome might also discourage corporations from making political expenditures. This scenario, however, could raise questions about whether the requirements were essentially stifling corporate political speech—a topic that is beyond the scope of this report but may, nonetheless, be controversial.

Revisit Disclosure or Disclaimer Requirements

Congress might also wish to require corporations to provide information about political advertising or other independent expenditures. Additional *disclosure* would likely entail reporting information about political spending to government regulators. By contrast, additional *disclaimers* would likely entail including identifying information within the advertising itself. These two approaches could be pursued separately or jointly.

Disclosure, as the term is understood in campaign finance terminology, refers to reporting certain information about contributions or expenditures, typically to the FEC. Political committees and certain other individuals or organizations regulated under FECA must already file regular disclosure reports with the FEC (or, in the case of Senate campaign committees, with the Secretary of the Senate).²⁴ Perhaps most notably for the purposes of this report, independent expenditures aggregating at least \$10,000 must be reported to the FEC within 48 hours; 24-hour reports for independent expenditures of at least \$1,000 must be made during periods immediately preceding elections.²⁵ The existing disclosure requirements concerning electioneering communications mandate 24-hour reporting of communications aggregating at least \$10,000.²⁶ Both the independent expenditure disclosure requirements and the electioneering communication requirements cover any “person,” including corporations and labor unions.²⁷ Therefore, it is possible that no legislative action is required to extend the current requirements to corporations following *Citizens United*. Legislative action could, however, be required to amend those requirements if Congress wished to do so.

The term *disclaimers* generally refers to identifying information that must be included in the content of political advertising. Perhaps most relevant for the purposes of this report, FECA requires that express advocacy messages funded by any “person” include

- the name of the person (including a corporation or union) who paid for the communication;²⁸

²⁴ 2 U.S.C. § 432(g).

²⁵ See, for example, 2 U.S.C. § 434(g).

²⁶ 2 U.S.C. § 434(f).

²⁷ 2 U.S.C. § 431(11).

²⁸ 2 U.S.C. § 441d(a)(3).

- the permanent street address, telephone number, or website address of the person who paid for the communication;²⁹
- if applicable, that the communication “is not authorized by any candidate or candidate’s committee.”³⁰

If Congress determines that existing requirements, such as these, are sufficient, it is possible that no additional legislative action will be necessary. If, however, Congress wanted corporations engaging in express advocacy to provide additional identifying information to the public, one option could be to extend a model akin to the “stand by your ad” disclaimers currently required in candidate advertising. These provisions, enacted in the Bipartisan Campaign Reform Act, require candidates to appear in broadcast advertising and state their approval of the ad.³¹ Thus far, bills such as H.R. 4432 (Grayson), H.R. 4527 (Driehaus), H.R. 4583 (Bocchieri), H.R. 4630 (Ackerman), H.R. 4749 (Price, NC), S. 2959 (Franken), and S. 3004 (Brown, OH) would require additional disclosures or disclaimers following *Citizens United*. As noted previously, H.R. 5175 (Van Hollen) S. 3295 (Schumer), and S. 3628 (Schumer) propose additional disclosure and disclaimer provisions.

Disclosure or disclaimer requirements could have the advantage of increasing transparency surrounding corporate political advertising. Some corporations might also be unwilling to engage in certain advertising if they do not wish to be publicly identified with particular political positions. Although the effect of a possible extension of the stand by your ad requirement to corporate advocacy is unclear, it might or might not affect the tone of such advertising.

Concluding Comments

Whether or how Congress chooses to respond to *Citizens United* will become clearer over time, as will the decision’s impact on the political or policy environments. Corporations (and presumably unions) now appear to be free to use their treasury funds to use political ads to call for election or defeat of federal (or state) candidates as often as they wish. If corporations or unions choose to do so extensively, such spending could dramatically affect the campaign environment by increasing the amount of money in politics—some argue potentially overshadowing candidates and parties. On the other hand, some potential safeguards appear to remain in effect. First, the ban on corporate contributions in federal elections remains. Second, the fact that corporations *can* spend political money in new ways does not necessarily mean that they will choose to do so. Finally, it is possible that the corporations interested in spending money on politics are already doing so to the extent they wish by supporting PACs, engaging in issue advocacy, or making contributions to 527 or 501(c) groups.³²

As the 2010 and 2012 election cycles unfold, Congress may wish to monitor various questions about how the political spending appears to be affected by *Citizens United*. One of the most fundamental questions may be whether *Citizens United* will, indeed, spur substantial new levels of corporate advertising surrounding elections. If so, will that advertising—particularly express advocacy—be funded directly by corporations? Or, will indirectly funded advertising, such as

²⁹ Ibid.

³⁰ Ibid.

³¹ 2 U.S.C. § 441d(d).

³² For an overview of 527s and 501(c) organizations, including a discussion of disclosure requirements, see, for example, CRS Report RS22895, *527 Groups and Campaign Activity: Analysis Under Campaign Finance and Tax Laws*, by L. Paige Whitaker and Erika K. Lunder; and CRS Report R40141, *501(c)(3) Organizations and Campaign Activity: Analysis Under Tax and Campaign Finance Laws*, by Erika K. Lunder and L. Paige Whitaker.

commercials already funded by 527 and 501(c) organizations, continue to be prominent? Similarly, will new advertising occur nationally or be targeted to specific races? How will affected campaigns respond, and how will the relative power of campaigns, parties, and other actors be affected? Will corporations continue to form PACs, pursue express advocacy alone, or both? The answers to these and other questions, which are not yet available, may help Congress determine how or whether to respond through public policy over the long term.

Table 1. Legislation Introduced in the 111th Congress Containing Policy Options that Could Be Relevant for Responses to the *Citizens United* Ruling

Legislation	Short Title	Sponsor	Type of Major Policy Option	Summary of Major Campaign Finance Provisions ^a	Latest Major Legislative Action
H.Con.Res. 13	—	Kaptur	Sense of Congress resolution	Would express sense of Congress that the Supreme Court misinterpreted the First Amendment in <i>Buckley v. Valeo</i> ^b	Referred to Judiciary Committee 01/08/2009
H.J.Res. 13	—	Kaptur	Constitutional amendment	Would permit Congress and the states to limit political contributions and expenditures	Referred to Judiciary Committee 01/08/2009
H.J.Res. 68	—	Boswell	Constitutional amendment	Would prohibit corporations and unions from funding advertising related to federal election campaigns	Referred to Judiciary Committee 01/21/2010
H.J.Res. 74	—	Edwards (MD)	Constitutional amendment	Would permit Congress and the states to limit political expenditures by corporations	Referred to Judiciary Committee 02/02/2010
H.J.Res. 84	—	Schrader	Constitutional amendment	Would permit Congress and the states to limit political contributions, and expenditures for certain political advertising	Referred to Judiciary Committee 05/13/2010
H.J.Res. 82	—	Hodes	Constitutional amendment	Would permit Congress and the states to limit political expenditures by corporations	Referred to Judiciary Committee 06/15/2010
H.Res. 1275	—	Yarmuth	Sense of the House resolution	Would express sense of the House that it disapproves of the Supreme Court's ruling in <i>Citizens United</i>	Referred to Committees on House Administration, Judiciary 04/20/2010

Legislation	Short Title	Sponsor	Type of Major Policy Option	Summary of Major Campaign Finance Provisions ^a	Latest Major Legislative Action
H.R. 158	Let the People Decide Clean Campaign Act	Obey	Public financing	Would publicly finance House campaigns	Referred to the Committees on House Administration, Ways and Means, and Rules 01/06/2009
H.R. 1095	Troubled Assets Relief Program Transparency Reporting Act	Maloney	Spending restriction	Would prohibit using certain federal economic assistance for lobbying and political contributions ^c	Referred to Committee on Financial Services 02/13/2009
H.R. 1826	Fair Elections Now Act	Larson	Public financing	Would publicly finance House campaigns	Hearing held by Committee on House Administration 07/30/2009
H.R. 2038	Clean Law for Earmark Accountability Reform (CLEAR) ^d Act	Hodes	Spending restriction	Would prohibit Members' authorized campaign committees from accepting contributions from entities (or affiliated PACs) for which they sought earmarks, or from senior executives or lobbyists of those entities	Referred to Committee on House Administration 04/22/2009
H.R. 2056	Clean Money, Clean Elections Act of 2009	Tierney	Public financing	Would publicly finance House campaigns	Referred to Committees on House Administration, Energy and Commerce, Ways and Means, and Oversight and Government Reform 04/22/2009
H.R. 3574	Restoring Confidence Through Smarter Campaigns Act	Higgins	Spending restriction	Would limit House campaign expenditures to \$500,000	Referred to Committee on House Administration 09/15/2009

Legislation	Short Title	Sponsor	Type of Major Policy Option	Summary of Major Campaign Finance Provisions ^a	Latest Major Legislative Action
H.R. 3859	Ethics in Foreign Lobbying Act of 2009	Kaptur	Spending restriction	Would prohibit expenditures or contributions in federal elections by PACs affiliated with foreign organizations or corporations	Referred to Committees on House Administration and Judiciary 10/20/2009
H.R. 4431	Business Should Mind its Own Business Act	Grayson	Tax	Would levy 500% tax on corporate campaign contributions ^c or electioneering communications; and deny tax deduction for political advocacy expenditures	Referred to Ways and Means Committee 01/13/2010
H.R. 4432	Corporate Propaganda Sunshine Act	Grayson	Disclosure/disclaimer requirement	Would require the SEC to revise regulations to require certain corporations to report expenditures to influence public opinion on matters other than promotion of the corporation's products or services	Referred to Financial Services Committee 01/13/2010
H.R. 4433	—	Grayson	PAC restriction	Would apply antitrust law to corporate PACs	Referred to Judiciary Committee 01/13/2010
H.R. 4434	End Political Kickbacks Act of 2009	Grayson	Spending restriction	Would prohibit certain corporations receiving government funds from making campaign contributions ^c ; would limit employees of such entities from contributing more than \$1,000 per year	Referred to Committee on House Administration 01/13/2010

Legislation	Short Title	Sponsor	Type of Major Policy Option	Summary of Major Campaign Finance Provisions ^a	Latest Major Legislative Action
H.R. 4435	—	Grayson	Spending restriction	Would prohibit national securities exchanges from effecting transactions in securities of a corporation unless the corporation certifies that it is in compliance with FECA contribution ^c and expenditure requirements	Referred to Financial Services Committee 01/13/2010
H.R. 4487	End the Hijacking of Shareholder Funds Act	Grayson	Shareholder protection	Would require approval from a majority of shareholders before spending corporate funds to influence public opinion on matters not related to the company's products or services	Referred to Financial Services Committee 01/21/2010
H.R. 4510	America is for Americans Act	Grayson	Spending restriction	Would amend FECA definition of "foreign national" to include corporations with one or more foreign principals with ownership interests	Referred to Committee on House Administration 01/26/2010
H.R. 4511	Pick Your Poison Act of 2010	Grayson	Spending restriction	Would prohibit corporations from making expenditures or electioneering communications as defined in FECA if the corporations employ or retain registered lobbyists	Referred to Committee on House Administration 01/26/2010
H.R. 4517	Freedom from Foreign-Based Manipulation in American Elections Act	Hall	Spending restriction	Would amend the FECA prohibition on contributions or independent expenditures by foreign nationals to include certain corporations	Referred to Committee on House Administration 01/26/2010

Legislation	Short Title	Sponsor	Type of Major Policy Option	Summary of Major Campaign Finance Provisions ^a	Latest Major Legislative Action
H.R. 4522	Prohibiting Foreign Influence in American Elections Act	Pascrell	Spending restrictions	Would amend the FECA prohibition on contributions or independent expenditures by foreign nationals to include certain corporations	Referred to Committee on House Administration 01/26/2010
H.R. 4523	Save Our Democracy from Foreign Influence Act of 2010	Perriello	Spending restriction	Would amend the FECA prohibition on contributions or independent expenditures by foreign nationals to include certain corporations	Referred to Committee on House Administration 01/26/2010
H.R. 4527	Corporate and Labor Electioneering Reform (CLEAR) Act ^e	Driehaus	Disclaimer/disclosure requirement	Would extend stand by your ad requirements to corporate and labor ads	Referred to Committee on House Administration 01/27/2010
H.R. 4537	Shareholder Protection Act of 2010 ^f	Capuano	Shareholder protection	Would require a majority of shareholders to approve certain political expenditures	Referred to Committee on Financial Services 01/27/2010
H.R. 4540	Prevent Foreign Influence in Our Elections Act	DeLauro	Spending restriction	Would amend the FECA prohibition on contributions or independent expenditures by foreign nationals to include certain corporations	Referred to Committee on House Administration 01/27/2010
H.R. 4550	No Taxpayer Money for Corporate Campaigns Act	Tsongas	Spending restriction	Would prohibit using federal funds for certain political or lobbying purposes	Referred to Committees on House Administration and the Judiciary 01/27/2010
H.R. 4583	Stand By Your Ad Act of 2010	Bocchieri	Disclaimer/disclosure requirement	Would extend stand by your ad disclaimer requirements to certain independent expenditures by 501(c) and 527 organizations; would require identification of the five largest funders for such ads	Referred to Committee on House Administration 02/03/2010

Legislation	Short Title	Sponsor	Type of Major Policy Option	Summary of Major Campaign Finance Provisions ^a	Latest Major Legislative Action
H.R. 4617	Separate Taxpayer Dollars from the Election Process Act of 2010	Walz	Spending restriction	Would prohibit using certain federal funds for expenditures or electioneering communications as defined in FECA	Referred to Committees on Financial Services and House Administration 02/05/2010
H.R. 4630	Corporate Politics Transparency Act	Ackerman	Disclaimer/disclosure requirement; Shareholder protection	Would require certain corporations to report information to the SEC and to shareholders regarding independent expenditures	Referred to Committee on Financial Services 02/22/2010
H.R. 4644	Fairness in Corporate Campaign Spending Act of 2010	Sestak	Shareholder protection	Would require a majority of shareholders to approve certain independent expenditures	Referred to Committee on House Administration 02/22/2010
H.R. 4749	Stand By Every Ad Act of 2010	Price (NC)	Disclaimer/disclosure requirement	Would extend certain FECA disclaimer requirements to communications that are “the functional equivalent of express advocacy” and to certain Internet, e-mail, and automated political telephone call communications; would extend “stand by your ad” requirements to certain advertising funded by individuals or corporations; would require donor disclaimers in certain advertising	Referred to Committee on House Administration 03/03/2010

Legislation	Short Title	Sponsor	Type of Major Policy Option	Summary of Major Campaign Finance Provisions ^a	Latest Major Legislative Action
H.R. 4768	Bailouts Are Not For Sale Act	Grayson	Spending restriction	Would prohibit certain corporations that make electioneering communications or independent expenditures from receiving Federal Reserve economic assistance	Referred to Financial Services Committee 03/04/2010
H.R. 4790	Shareholder Protection Act of 2010 ^s	Capuano	Shareholder protection	Would require a majority of shareholders to approve certain expenditures for “political activities” for the following fiscal year; would require board approval for political activities exceeding \$50,000; includes safe harbor for votes not constituting campaign finance coordination	Ordered reported by Financial Services Committee 07/29/2010 (see also table note g)
H.R. 5175	Democracy is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act	Van Hollen	Spending restriction; Disclaimer/disclosure requirement	Would extend various disclaimer and disclosure requirements applicable to campaign-related spending by corporations, unions, and tax-exempt organizations in certain circumstances; would restrict expenditures by certain: corporations or other organizations subject to foreign influence, TARP recipients, and government contractors	Passed by the House (219-206), 06/24/2010

Legislation	Short Title	Sponsor	Type of Major Policy Option	Summary of Major Campaign Finance Provisions ^a	Latest Major Legislative Action
H.R. 6116	Fair Elections Now Act	Larson	Public financing	Would publicly finance House campaigns	Referred to Committees on House Administration and Energy and Commerce 09/14/2010
S.J.Res. 28	—	Dodd	Constitutional amendment	Would permit Congress and the states to limit political contributions and expenditures	Referred to the Judiciary Committee 02/24/2010
S.J.Res. 36	—	Baucus	Constitutional amendment	Would permit Congress and the states to limit political contributions and expenditures	Referred to the Judiciary Committee 07/27/2010
S. 133	Troubled Assets Relief Program Transparency Reporting Act	Feinstein	Spending restriction	Would prohibit using certain federal economic assistance for lobbying and political contributions ^c	Referred to Committee on Banking, Housing, and Urban Affairs 01/06/2009
S. 752	Fair Elections Now Act	Durbin	Public financing	Would publicly finance Senate campaigns	Referred to the Committee on Rules and Administration 03/31/2009
S. 2954	Prohibiting Foreign Influence in American Elections Act	Menendez	Spending restriction	Would amend the FECA prohibition on contributions or independent expenditures by foreign nationals to include certain corporations	Referred to the Committee on Rules and Administration 01/26/2010

Legislation	Short Title	Sponsor	Type of Major Policy Option	Summary of Major Campaign Finance Provisions^a	Latest Major Legislative Action
S. 2959	American Elections Act of 2010	Franken	Spending restriction; Disclaimer/disclosure requirement	Would amend the FECA prohibition on contributions or independent expenditures by foreign nationals to include certain corporations; would require additional disclosures and disclaimers related to foreign control or sources	Referred to Committee on Rules and Administration 01/27/2010
S. 3004	Citizens Right to Know Act	Brown (OH)	Shareholder protection; Spending restriction; Disclosure/disclaimer requirement	Would require additional disclosure to shareholders regarding electioneering communications and shareholder approval for such communications; would prohibit electioneering communications by certain corporations with foreign ownership or control interests; would extend stand by your ad requirements to certain corporate political advertising	Referred to Committee on Banking, Housing, and Urban Affairs 02/04/2010

Legislation	Short Title	Sponsor	Type of Major Policy Option	Summary of Major Campaign Finance Provisions^a	Latest Major Legislative Action
S. 3295	Democracy is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act	Schumer	Spending restriction; Disclaimer/disclosure requirement	Would extend various disclaimer and disclosure requirements applicable to campaign-related spending by corporations, unions, and tax-exempt organizations in certain circumstances; would restrict expenditures by certain: corporations or other organizations subject to foreign influence, TARP recipients, and government contractors; contains media-rate and electronic filing provisions not addressed in House bill (H.R. 5175)	Referred to Committee on Rules and Administration 04/30/2010

S. 3628	Democracy is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act	Schumer	Spending restriction; Disclaimer/disclosure requirement	Would extend various disclaimer and disclosure requirements applicable to campaign-related spending by corporations, unions, and tax-exempt organizations in certain circumstances; would restrict expenditures by certain: corporations or other organizations subject to foreign influence, TARP recipients, and government contractors; contains media-rate and electronic filing provisions not addressed in House bill (H.R. 5175)	Cloture not invoked 07/27/2010
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Source: CRS analysis of bill texts obtained via the Legislative Information System (LIS).

Notes: Information in the table is for overview purposes only; individual bill texts provide additional detail. Additional legislation not reflected in the table may also be relevant. The table does not include bills that do not appear to be explicitly related to campaign finance. This table will be updated periodically.

- a. This column includes summary information only. The contents of individual bills vary, particularly with respect to use of particular terms or definitions reflected in the column. See the text of the measures for additional detail. In some cases, items labeled as “spending restriction” are primarily restrictions on contributions.
- b. For additional discussion of *Buckley*, see CRS Report RL30669, *The Constitutionality of Campaign Finance Regulation: Buckley v. Valeo and Its Supreme Court Progeny*, by L. Paige Whitaker.
- c. Corporate and union treasury contributions remain prohibited per 2 U.S.C. § 441b.
- d. H.R. 2038 and H.R. 4527 both use the “CLEAR” acronym. The two measures are not companions and have different full titles.
- e. H.R. 4527 and H.R. 2038 both use the “CLEAR” acronym. The two measures are not companions and have different full titles.
- f. H.R. 4537 and H.R. 4790 share the same title. Representative Capuano introduced both bills. H.R. 4790 is a modified version of H.R. 4537.
- g. H.R. 4790 and H.R. 4537 share the same title. Representative Capuano introduced both bills. H.R. 4790 is a modified version of H.R. 4537. H.R. 4790 was discussed at the March 11, 2010, hearing mentioned in the text of this report, although the hearing was on not on H.R. 4790 per se.

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